ANNOUNCEMENT

The REVIEW takes pleasure in announcing the election of Solomon Freedman to the Editorial Board, and Harry L. Clark, George S. Friedman, and Elliot M. Winer to the Business Board. The REVIEW also announces the resignation of Solomon Freedman from the Business Board.

NOTES

NEBBIA V. PEOPLE: A MILESTONE—In January and March, 1933, the Supreme Court of the United States rendered two decisions which are bound to rank in importance with the famous cases of constitutional law. The first of these cases, *Home Building and Loan Association v. Blaisdell,*[1] held that in time of economic emergency a state statute does not impair the obligation of contracts or violate due process by extending the time within which the "equity of redemption" could be exercised.

The second case, *Nebbia v. People,*[2] decided that for a business admittedly not a public utility the state legislature can enact laws authorizing the fixing of prices and other regulation of that industry, and that the courts will not set aside such laws or orders issued thereunder as denying due process unless they are "arbitrary, discriminatory or demonstrably irrelevant to the policy the Legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty."

This decision is important not because it enunciates new principles of constitutional law, but because it applies existing principles in a different way, and marks distinctly a change from recent conceptions of due process. This change is so great as to overrule for all practical purposes a host of cases decided in recent years under the due process clause.

The Facts

In the winter of 1933 the Legislature of New York established a Milk Control Board with power, among other things, to "fix minimum . . . and maximum . . . retail prices to be charged by . . . stores to consumers except for consumption on the premises where sold".[3] The Board fixed 9¢ as the price to be charged by a store for a quart of milk. Nebbia, the proprietor of a grocery store in Rochester, sold two quarts and a 5¢ loaf of bread for 18¢ and was convicted for violating the Board's order on the theory that giving a gratuity amounted to a cutting in his price. At his trial he asserted the statute and order contravened the equal protection clause and the due process clause of the Fourteenth Amendment and he renewed the contention in successive appeals to the county court and the Court of Appeals. Both overruled his claim and affirmed the conviction. The Supreme Court of the United States did likewise.

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[1] U. S. L. W., Jan. 9, 1934, at 381. This decision was the subject of an article in this REVIEW, and needs no further comment. See Corwin, *Moratorium over Minnesota* (1934) 82 U. OF PA. L. REV. 311.

[2] U. S. L. W., March 6, 1934, at 551. Both decisions were by a 5 to 4 vote, and in each case the members of the majority and minority were the same. The majority members were Chief Justice Hughes and Justices Brandeis, Stone, Roberts and Cardozo, and the opinions were written by the Chief Justice, in the Blaisdell case, and Mr. Justice Roberts in the Nebbia case. Strong dissenting opinions were written in each case by Justices Sutherland and McReynolds, respectively.

[3] N. Y. Laws of 1933, c. 158, § 312 (b).

The Court gave little consideration to the argument as to equal protection, and approached the question whether such an act violated due process as follows: four pages of the opinion were devoted to a discussion of the economic situation in the state of New York, the careful investigation of the subject which had been made by a legislative committee and the care with which the legislature had considered the legislation. The Court then pointed out the fact that the milk industry, next to common carriers, has been more subject to state regulation under the police power than any other industry, due to its relation to the public health.

From that point on the Court developed the theory that in the exercise of the police power for the general welfare, price regulation does not differ from any other regulation. The Court pointed out that it has sustained as a valid regulation under the police power of the states the regulation of banks, insurance, physicians, dentists, employment agencies, public weighers of grain, real estate brokers, bill boards, party walls, the height of buildings, zoning laws, the size of loaves of bread and of packages of food, the sale of cigarettes, the sale of spectacles, private detectives, grain brokers, the business of renting automobiles to be used by the lessee upon the public streets, the sales of stock or grain on margin, the conduct of pool and billiard rooms by aliens or ordinary persons, the sale of liquor, the business of soliciting claims by any one not an attorney, the manufacture and sale of oleomargarine, and many other businesses and activities. The opinion called particular attention to state usury laws which fix a maximum price to be paid for the loan of money and which have always been held constitutional. The Court held that if such regulation is proper, there is no distinction between that regulation and the regulation of prices. In this connection the Court said:

> "If the law-making body within its sphere of government concludes that the conditions or practices in an industry make unrestricted competition an inadequate safeguard of the consumer's interests . . . produce waste harmful to the public, threaten ultimately to cut off the supply of a commodity needed by the public or portend the destruction of the industry itself, appropriate statutes passed in an honest effort to correct the threatened consequences may not be set aside because the regulation adopted fixes prices reasonably deemed by the legislature to be fair to those engaged in the industry and to the consuming public. And this is especially so where, as here, the economic maladjustment is one of price, which threatens harm to the producer at one end of the series and the consumer at the other. The Constitution does not secure to anyone liberty to conduct his business in such fashion as to inflict injury upon the public at large, or upon any substantial group of the people. Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." [4]

Emergency Doctrine Disregarded

The opinion is notable from a technical point of view not only because it disregarded the so-called emergency doctrine, but also because it relied for its principles chiefly upon a case decided in 1876.[5] It has been thought by most commentators and stated in practically all arguments before various courts that this type of price fixing legislation, which had so often been declared unconstitutional, would only be sustained on an emergency basis for a limited period, as

[4] Nebbia v. People, *supra* note 2, at 556.

[5] Munn v. Illinois, 94 U. S. 113 (1876).

principally set forth in the cases of *Wilson v. New*[6] and *Block v. Hirsh.*[7] It is therefore interesting to note that the Court has not relied on the economic emergency or on the temporary character of the legislation, but has gone much further and has placed the decision solely on the ground that the state has a right to pass price fixing legislation as part of its police power whenever the welfare of its citizens reasonably demands it.

Emphasis on Early Decisions

In its decision the Court relied principally on the case of *Munn v. Illinois,*[8] decided in 1876. The significance to be attached to the three page discussion of this case is great and will be much emphasized by students of jurisprudence.

As has been brilliantly pointed out by Charles Grover Haines[9] the approach of the Court to the due process clause has not always been the same. As originally passed, the Fourteenth Amendment was designed primarily to protect the negro race in its newly acquired rights and privileges, and the early Supreme Court decisions adopted that view.[10] One of the first attempts made to secure protection under the due process clause from legislative regulation of private business was in the *Munn* case, and the Court refused to accept the extended application of "due process of law" contended for by the business interests involved.[11] Shortly thereafter, the philosophy of the country began to change and the economic doctrine of *laissez-faire,* propounded chiefly by Adam Smith[12] received increasing support. It was soon being urged on the Court that private rights of property must be protected from legislative control and that the due process clause was the medium through which this should be done.[13] The Court gradually adopted this view and there began that trend of decisions which limited the state legislatures in their power over liberty and property and culminated in such decisions as *Adkins v. Children's Hospital,*[14] *Wolff Packing Co. v. Court of Industrial Relations,*[15] *Lochner v. New York,*[16] *Tyson & Brother v. Banton,*[17] *Fairmont Creamery Co. v. Minnesota,*[18] *Williams v. Standard Oil Co. of La.,*[19] and *New State Ice Co. v. Liebmann.*[20]

These later decisions uniformly held that price fixing and regulation of hours and wages in businesses not affected with a public interest was unconsti-

[6] 243 U. S. 332, 37 Sup. Ct. 298 (1917).

[7] 256 U. S. 135, 41 Sup. Ct. 458 (1921). See also Brass v. North Dakota, 153 U. S. 391, 14 Sup. Ct. 857 (1894), where the testimony showed that the business was keenly competitive, and that nevertheless price regulation was proper.

[8] *Supra* note 5.

[9] HAINES, THE REVIVAL OF NATURAL LAW CONCEPTS (1930).

[10] Slaughter House Cases, 16 U. S. 36 (1872); Corwin, *The Supreme Court and the Fourteenth Amendment* (1909) 7 MICH. L. REV. 643.

[11] See *supra* note 5.

[12] SMITH, THE WEALTH OF NATIONS (1776) Bk. 1, c. 10.

[13] See the argument of Joseph H. Choate in Pollock v. Farmers' Loan & Trust Co., 157 U. S. 429, 532 (1895). See also COOLEY, CONSTITUTIONAL LIMITATIONS (2d ed. 1871) 4, where the author favors the doctrine that "there are on all sides definite limitations which circumscribe the legislative authority, aside from the specific restrictions which the people impose by their constitutions".

[14] 261 U. S. 525, 43 Sup. Ct. 394 (1923).

[15] 262 U. S. 522, 43 Sup. Ct. 630 (1923).

[16] 198 U. S. 45, 25 Sup. Ct. 539 (1905).

[17] 273 U. S. 418, 47 Sup. Ct. 426 (1927).

[18] 274 U. S. 1, 47 Sup. Ct. 506 (1927).

[19] 278 U. S. 235, 49 Sup. Ct. 115 (1929).

[20] 285 U. S. 262, 52 Sup. Ct. 371 (1932).

tutional as violative of due process, and that "affected with a public interest" meant in effect, "touched with a public use". A short quotation from the last mentioned case will illustrate this point.

> "It [the ice business] is a business as essentially private in its nature as the business of the grocer, the dairyman, the butcher, the baker, the shoemaker, or the tailor . . . and this Court has definitely said that the production or sale of food or clothing cannot be subjected to legislative regulation on the basis of a public use." [21]

Importance of the Opinion

The present opinion, then, is vitally important because it reverses the trend. The cases cited above are skipped over, and on their facts practically overruled, the Court going back to the doctrine of *Munn v. Illinois*. The law now is that "affected with a public interest" is the equivalent of "subject to the exercise of the police power" and all businesses may be subject to the exercise of the police power if the legislature reasonably states that the public welfare is involved. Mr. Justice Roberts amplifies this thought as follows:

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislative arm, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied . . . 'Whether the free operation of the normal laws of competition is a wise and wholesome rule for trade and commerce is an economic question which this court need not consider or determine.' "
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> "It is clear that there is no closed class or category of businesses affected with a public interest, and the function of courts in the application of the Fifth and Fourteenth Amendments is to determine in each case whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory". [22]

Under this decision, therefore, insofar as the due process clause is concerned, it is possible that a state may legally regulate all its businesses even to the extent of fixing prices, wages and hours of labor. Business has lost a large part of the protection it believed the Fourteenth Amendment gave it.

The decision marks the change from an era of *laissez faire* to an era of governmental regulation. It evidences the fact that to a great mass of our people security has become more important than unrestricted opportunity. It means that the philosophy and therefore the approach, or as the philosophers call it, the values of the erstwhile minority led by Justices Holmes and Brandeis, who so long advocated complete freedom of the states in economic and social legislation, has now become that of the majority. It means further that in so far as the due process clause is concerned the doctrines advocated in *The Dissenting Opinions of Mr. Justice Holmes* [23] are now the law of the land.

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[21] *Id.* at 277, 52 Sup. Ct. at 374.

[22] Nebbia v. People, *supra* note 2, at 555.

[23] (1929).

Effect on N. R. A. and A. A. A.

In conclusion, inquiry must be made as to what effect, if any, this decision has upon the constitutionality of such federal legislation as the N. R. A. and the A. A. A. First, it is clear that this decision is not direct authority for the constitutionality of federal legislation. The Court here decided that a price fixing statute was proper state legislation under the police power.

Second, it is equally clear that the decision throws a light upon the philosophy which now governs the Court and shows that the Court is not unduly distressed by the thought of government control over so-called economic laws.

Third, the Court in its opinion gave a clue when it said, "Thus has this court from the early days affirmed that the power to promote the general welfare is inherent in government. Touching the matters committed to it by the Constitution, the United States possesses the power, as do the states in their sovereign capacity touching all subjects, jurisdiction of which is not surrendered to the federal government."

Therefore, the question as to the N. R. A. and A. A. A. and other "new deal" legislation is left largely as this: "Can these acts properly be brought within a delegated power or a power reasonably to be implied therefrom?" If they can, the fact that they contemplate price regulation, wage regulation or any other regulation of business or the fact that violation of the act is a criminal offense, is immaterial. Such regulation will be due process unless "arbitrary, discriminatory or demonstrably irrelevant to the policy the legislature is free to adopt".

Insofar as the N. R. A. and the A. A. A. are concerned the Court must now determine whether it will extend the "commerce clause" to include a myriad of intrastate transactions. It may well be that having determined that the states have practically complete power within their sphere, the Court will hesitate to extend the "commerce clause" beyond its obvious intent. On the other hand, treating the Constitution as a living document and taking into consideration the speed of modern communication and the unity of our nation, the Court may say that everything affecting interstate commerce may be regulated as a part of interstate commerce. To so decide they will have to extend the "commerce clause" and the due process clause of the Fifth Amendment further than ever before.

The Court, having gone back to the early decisions under the Fourteenth Amendment, may well return for support to the early decisions under the "commerce clause", many of which, beginning with *Gibbons v. Ogden*,[24] upheld the theory of a wider federal control.

A further possibility is that the Court may decide, if not now then at some time in the future, that the Constitution delegated to the federal government the powers of a sovereign nation, which powers have been defined in the law of nations, and are sufficient to justify legislation for the welfare of the people as a whole, particularly in matters which, by reason of changing economic and social conditions, cannot be handled effectively by the individual states. To the narrow constructionist such a thought is equivalent to scrapping the Constitution. To many liberal thinkers it would merely be carrying into effect their conception of the Constitution as a living document sufficient at all times to meet the needs of our people under changed conditions.

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[24] 22 U. S. 1 (1824).

CRIMINALITY IN THE ASYLUM AS A REQUIREMENT OF INTERNATIONAL EXTRADITION—The subject of extradition has been brought into public prominence by two recent episodes: the attempt of the United States to procure the surrender of Samuel Insull from Greece,[1] and the effort of Great Britain to extradite John Factor from this country. The latter, if less notorious, involved a more serious problem and resulted in a decision of far-reaching consequence. In the case of *Factor v. Laubenheimer* [2] the Supreme Court of the United States decided that the Government was "bound by treaty to surrender its citizens and others to England there to be prosecuted criminally and punished for that which if committed here would transgress no law—federal or state".[3] This decision is something of a revolution in the history of international extradition. Hitherto it had apparently been taken for granted that it was implied in every extradition treaty that an offense to be extraditable must be a crime both in the demanding country and in the country of asylum. Only two previous American cases had involved the question, both in the lower federal courts. Although one of these cases decided the point substantially as in the *Factor* case,[4] the other appears directly *contra*,[5] and the requirement of mutual criminality has been reiterated in numerous *dicta* by the Supreme Court and the lower courts, and in the writings of eminent publicists.[6] The recent decision therefore invites an inquiry into two questions, one judicial, the other political: (1) Do the treaties with Great Britain, under which Factor's extradition was sought, properly permit the interpretation placed upon them by the Court? (2) To what extent should governments, in providing for extradition, require criminality in the asylum as a condition?

I

The treaties involved in the *Factor* case are the treaty of 1842 with Great Britain,[7] and the supplementary convention of 1889.[8] The former provided for the mutual surrender of persons charged with any of a number of enumerated criminal offenses.[9] The convention of 1889 added to the list of extraditable offenses.[10] Factor was apprehended in Illinois on the complaint of the British

[1] See Note (1933) 31 MICH. L. REV. 544.

[2] 54 Sup. Ct. 191 (1933). A dissenting opinion was written by Mr. Justice Butler, in which Mr. Justice Brandeis and Mr. Justice Roberts concurred.

[3] These are the words of the dissenting Justice. *Id.* at 199.

[4] *In re* Metzger, 17 Fed. Cas. 232 (S. D. N. Y. 1847) (holding extradition permissible under a treaty with France, though the acts charged were not criminal in New York, the state of asylum).

[5] *In re* Frank, 107 Fed. 272 (D. Ore. 1901) (holding that extradition could not be permitted under a treaty with Great Britain because the acts charged, though falling within the treaty offense of "embezzlement", were not criminal in Oregon, the state of asylum).

[6] See Wright v. Henkel, 190 U. S. 40, 58, 23 Sup. Ct. 781, 785 (1903); Kelly v. Griffin, 241 U. S. 6, 14, 36 Sup. Ct. 487, 489 (1915); Collins v. Loisel, 259 U. S. 309, 311, 42 Sup. Ct. 469, 471 (1922); Muller's Case, 17 Fed. Cas. 975, 976 (E. D. Pa. 1863); Cohn v. Jones, 100 Fed. 639, 645 (S. D. Iowa 1900); United States v. Greene, 146 Fed. 766, 770 (S. D. Ga. 1906); Powell v. United States, 206 Fed. 400, 403 (C. C. A. 6th, 1913); United States v. Moore, 46 F. (2d) 308, 310 (E. D. N. Y. 1930); Bernstein v. Gross, 58 F. (2d) 154, 155 (C. C. A. 5th, 1932); BIRON AND CHALMERS, EXTRADITION (1903) 11; 1 HYDE, INTERNATIONAL LAW (1922) 570; 1 MOORE, EXTRADITION (1891) 106n, 112; PIGGOTT, EXTRADITION (1910) 109; Brierly, *Report of Sub-committee on Extradition, League of Nations* (1926) 20 AM. J. INT. L. 242. But *cf.* Benson v. McMahon, 127 U. S. 457 (1888).

[7] Art. x deals with extradition. 1 MALLOY, TREATIES (1910) 650, 655.

[8] *Id.* at 740.

[9] ". . . murder, or assault with intent to commit murder, or piracy, or arson, or robbery, or forgery, or the utterance of forged paper."

[10] The list included the offense charged in the principal case: ". . . receiving any money, valuable security, or other property, knowing the same to have been embezzled, stolen, or fraudulently obtained." Art. i, par. 3.

government charging him with the crime of receiving money knowing it to have been fraudulently obtained, an offense listed in the convention of 1889. On a petition for a writ of *habeas corpus* the District Court ordered Factor discharged, on the ground that the acts charged were not a crime in Illinois.[11] The Circuit Court of Appeals reversed this holding on the ground that the acts charged did constitute a crime in that state.[12] It is interesting to note that neither of these courts disputed Factor's basic contention that the acts charged must constitute a crime by the laws of Illinois, the state of asylum; the District Court based its decision on this contention, and the Circuit Court of Appeals expressly conceded it.[13] On appeal to the Supreme Court this position was for the first time seriously attacked by counsel for the British government; and the Court, apparently admitting that the laws of Illinois did not make the offense a crime,[14] held that criminality in the asylum was not necessary under the treaties, and affirmed the decision of the Circuit Court of Appeals.

Although some doubt exists with reference to the question, it may be conceded that both the duty[15] and the power[16] of the American government to extradite alleged criminals rests solely upon the treaties which it contracts with foreign nations. The treaties involved in the *Factor* case, like most American treaties on the subject, contain no general provision expressly requiring criminality in both countries.[17] It is therefore necessary to inquire whether the treaty will in any other way permit the construction that such a condition is required. It is an accepted principle that treaties are to be construed according to the intention of the contracting governments[18]—an intention to be ascertained not only from the language of the treaties, but from all the circumstances attending the negotiation thereof which may reveal the purpose of the parties.[19] The only language which might possibly be construed as indicating an intention to condition extradition on criminality in the asylum is the provision requiring that the laws of the asylum shall be the test of the sufficiency of the evidence to warrant hold-

[11] The decision of the District Court is unreported. The information is taken from the report of the case on appeal. See principal case at 192.

[12] Laubenheimer v. Factor, 61 F. (2d) 626 (C. C. A. 7th, 1932). The court relied principally upon Kelly v. Griffin, *supra* note 6, which held that the acts constituted a crime in Illinois.

[13] *Supra* note 12, at 629.

[14] There is no express admission to this effect, but since the court went to great length to dispose of the principal contention, which would be unnecessary if the crime existed in Illinois, the admission may be safely implied. It is so stated in the dissenting opinion. See principal case at 201.

[15] Grotius and Vattel apparently considered the surrender of fugitive criminals an international obligation. GROTIUS, DE JURE BELLI ET PACIS (1625) bk. II, c. 21, §§ 3, 4 [translation in CLARKE, EXTRADITION (4th ed. 1903) 2]; VATTEL, LE DROIT DES GENS (1758) bk. II, c. 6, §§ 76, 77 [translation in CLARKE, *supra* at 3]. See Matter of Washburn, 4 Johns. Ch. 106, 108 (N. Y. 1819). The weight of modern opinion is to the contrary. See United States v. Rauscher, 119 U. S. 407, 412, 7 Sup. Ct. 234, 236 (1886); principal case at 193; 1 MOORE, at 13; 1 HYDE, at 567, both *op. cit. supra* note 6. But see CLARKE, *supra* at 14.

[16] See United States v. Davis, 2 Sumner 482, 486 (C. C. Mass. 1837); 1 MOORE, *op. cit. supra* note 6, at 21.

[17] A few American treaties contain express provisions requiring mutual criminality: Great Britain, for Philippines and Guam and British Borneo (1913), 3 SEN. DOC. No. 348, 67th Cong., 4th Sess., at 2637. Austria, 46 STAT. 2779 (1930); Germany, 47 STAT. 74 (1931). Compare the provisions in a number of treaties to the effect that extradition will not be granted when the crime, because of statutory limitation, is unpunishable by the laws of the asylum: Netherlands (1880), 2 MALLOY, *op. cit. supra* note 7, at 1261; Luxemberg (1883), 1 *id.* at 1053; Argentina (1896), 1 *id.* at 25; Denmark (1902), 1 *id.* at 390; France (1909), 3 SEN. DOC. No. 348, 67th Cong., 4th Sess., at 2580.

[18] See *In re* Ross, 140 U. S. 453, 475, 11 Sup. Ct. 897, 904 (1891); Hyde, *Interpretation of Treaties by the Supreme Court of the United States* (1929) 23 AM. J. INT. L. 824.

[19] See *id.* at 827.

ing the fugitive for extradition. Such evidence is required as "would justify his apprehension and commitment for trial, if the crime or offense had there been committed".[20] It is conceded that this refers only to evidence of the *facts* alleged, not to the law determining the criminal nature of the facts;[21] but it is urged that the language used indicates an understanding by the parties that criminality is to be tested by the laws of the asylum.[22] While it is possible to read into the clause a tacit understanding that the crime *could* be committed in the place of asylum, there seems little justification for the conclusion that the parties intended to make such a condition a binding term of the treaties.

In the absence of treaty language which could reasonably be construed as expressing an intention to require criminality in the asylum, the "burden of proof" would seem to be upon those contending that an intention thus to restrict extradition should be implied from circumstances outside the terms of the treaties. But circumstances attending the negotiation of the treaties involved in the *Factor* case afford little convincing evidence of the parties' intention. In 1842, when the basic treaty with Great Britain was drafted, the practice of extradition for non-political crimes was in the first years of development. It was one of the first treaties of the kind entered into by the United States or any country.[23] These circumstances may point to the conclusion that both people and governments were suspicious of the practice, and would be unlikely to extend the privilege of extradition to conduct not criminal in the asylum. But the evidence of such a feeling is extremely meager. Mr. Moore states that the treaty of 1842 "awoke violent opposition in the United States",[24] but he gives no authority for the statement. The newspapers of the period are silent upon the subject,[25] indicating that it did not loom very large in the public mind. That the problems of extradition did not greatly disturb the diplomats and legislators is apparent from the fact that the subject of extradition is treated in but one article, the tenth, of a comprehensive treaty dealing with subjects which were probably far more important at the time than extradition.[26]

Nothing more appears either from the treaties themselves or the circumstances surrounding their negotiation which might reveal an intention of the parties to require criminality in the asylum. Other arguments are concerned with the subsequent opinions of authorities. The virtual unanimity of opinion in favor of the requirement among publicists and American courts has already been noted.[27] The view taken by the governments and courts of Great Britain and other parts of the British Empire is especially entitled to consideration. It is clearly the policy of the British government,[28] as well as the opinion of the

[20] Treaty of 1842, art. x, *supra* note 7.

[21] See principal case at 194 and 203.

[22] *Id.* at 203; 1 HYDE, *loc. cit. supra* note 6.

[23] See 1 MOORE, *op. cit. supra* note 6, at 8 *et seq.*

[24] 1 *id.* at 12; see also 2 *id.* at 1059.

[25] See N. Y. Weekly Tribune, Dec. 10, 1842, at 1; North American, Dec. 3, 1842, at 2, Dec. 8, 1842, at 2, Dec. 9, 1842, at 2; Public Ledger, Dec. 8, 1842, at 2. In all these newspapers reference is made to the treaty of 1842, and though there is comment upon the questions of the slave trade and boundaries (also dealt with in the treaty) no mention is made of extradition.

[26] Settlement of boundary disputes and suppression of the slave trade. See 1 MALLOY, *loc. cit. supra* note 7.

[27] *Supra* note 6.

[28] "Extradition crime" is defined by statute as a "crime which, if committed in England or within English jurisdiction, would be one of the crimes described". Extradition Act, 33 & 34 VICT. c. 52, § 26 (1870). See also First Schedule of the Act. The Canadian statute is to the same effect. 2 REV. STAT. (1886) c. 142, § 2 (b).

courts,[29] that extradition will not be granted unless the offense charged is a crime in the asylum. Since it cannot reasonably be supposed that the British authorities would deliberately refuse to carry out the terms of the treaties, it must be assumed that they construe the treaties as supporting their position. This is a responsible expression of opinion as to the construction by the representatives of one of the parties to the treaties here involved.[30] But it should be borne in mind that even authoritative opinions, though entitled to consideration, have no direct bearing upon the primary problem of ascertaining the parties' intention. Moreover it is not unlikely that many of the non-judicial opinions go no further than to declare the *policy* which governments have pursued or ought to pursue in making arrangements for extradition, and do not attempt to set forth the *law* as defined by the treaties.

Considering all the circumstances the most plausible conclusion is that the parties entertained no intention upon the matter one way or the other. The governments, in drafting the treaty in 1842, doubtless were thinking of extradition only in respect to the offenses therein enumerated, all of which were universally recognized as criminal.[31] The most that can be said is that if the parties *had* thought of the question they probably would have intended to include the requirement. The conclusion seems proper that the treaties should be read as they stand, without implying any provisions as to mutual criminality.

The majority of the Court does not dispose of the case in this way, but indulges in elaborate arguments to justify its decision. The first point made is that since neither of the treaties in question contains any blanket provision requiring criminality in both countries for all offenses, and since some of the enumerated offenses (not including that with which Factor was charged) are qualified by the expression "made criminal by the laws of both countries" or its equivalent,[32] the parties must have intended to limit the qualification to those offenses.[33] In the phrase quoted, the Court reaches its conclusion by stressing the words "both countries". A slight shift in emphasis removes the whole force of the argument: if, instead, the word "criminal" is stressed, the expression can quite as easily be explained as a caveat, emphasizing the principle that only such violations of the law as amount to crimes are subject to extradition proceedings. This is clearly applicable to the offense of "fraud", a generic term including purely civil as well as criminal wrongs.[34]

The point made by the Court as to the statement of Secretary of State Calhoun that the treaty (of 1842) does not require criminality in the asylum[35]

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[29] Rex v. Governor [1912] 3 K. B. 568; *Re* Staggs, 22 W. L. R. 853 (Can. 1912); Rex v. Garvey, 6 N. Z. L. R. 630 (1888); *cf. In re* Windsor, 6 B. & S. 522 (1865); see *Re* Bellencoutre, 17 Cox C. C. 253, 263 (1891); *In re* Arton [1896] 1 Q. B. 509, 517; *In re* Collins, 11 B. C. R. 436, 446 (Can. 1905); *In re* Smith, 4 Practice Rep. 215, 216 (Can. 1868). But see *Re* Phipps, 1 Ont. R. 586, 609 (Can. 1882).

[30] This is not the argument of the dissenting Justice, who contended that the principle of reciprocity would be violated if the treaty were construed so as to obligate the United States to extradite for offenses not criminal in the asylum because "admittedly England did not so agree". See principal case at 201. This argument is unsound because it is not admitted that England so agreed, and the argument therefore begs that important question. That England later thought it had so agreed is a different matter.

[31] *Supra* note 9.

[32] The qualified offenses, all in the convention of 1889, are: "Fraud by bailee, banker, agent, factor, trustee, or director or member or officer of any company, made criminal by the laws of both countries;" "Crimes or offenses against the laws of both countries for the suppression of slavery and slave-trading;" and "participation in any of the crimes mentioned . . . provided such participation be punishable by the laws of both countries". Art. i, convention of 1889, *supra* note 8.

[33] See principal case at 195.

[34] See argument of counsel in Wright v. Henkel, *supra* note 6, at 56.

[35] Principal case at 196.

seems to be of little weight. As the dissenting Justice points out,[36] the statement was made under peculiar circumstances prompting the Secretary to interpret the treaty so as to obtain the extradition of a fugitive slave. But even accepting this as an authoritative expression of the American stand on this question at that time, the United States, if it reversed its position in the instant case, would be guilty of no greater inconsistency than is embodied in the English contention.

The Court also invokes a rule of construction, stated and applied in earlier cases, that "if a treaty fairly admits of two constructions, one restricting the rights which may be claimed under it, and the other enlarging it [*sic*] the more liberal construction is to be preferred".[37] It would seem that this principle is properly applicable where an attempt has been made to express an intention, but the result is an ambiguity, rather than where no intention is expressed or apparent, as in the present case.

The arguments adduced by the Court do not materially strengthen its position. It is rather the weakness of the opposing arguments, the failure to show any intention on the part of the contracting governments to require mutual criminality, that justifies the result reached. Because the meaning of the treaties is so doubtful, it becomes increasingly important to inquire into the desirability of the doctrine which the decision announces.

II

Treaty provisions aside, it is extraordinary that courts and legal writers have stated it even as a principle of international policy that criminality in the asylum is a prerequisite of extradition, with hardly a dispute or question of the soundness and desirability of such a requirement. Rarely has the policy been criticized, either favorably or adversely.[38] The closest approach to a comprehensive inquiry into the question appears to be that of the British Royal Commissioners on Extradition in their report of 1878.[39] This was a study of extradition, with criticisms of the practice at the time and recommendations for future British policy. It was stated that an offense to be extraditable should be a crime under English law.[40] Two reasons were given for this position: that it is a general principle of extradition that only offenses which it is to the common interest of all nations to suppress should be extraditable; and that it is inconvenient to require committing magistrates, in determining whether an offense is extraditable, to inquire into the law of the demanding nation. The inadequacy of these explanations is apparent. Even if it is wise to limit extradition to classes of offenses generally regarded as anti-social,[41] whether or not the law of one country or locality condemns particular acts as crimes is no test of their undesirable character in general. The principal case is an apt illustration of this point.

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[36] *Id.* at 205.

[37] *Id.* at 196; Geofroy v. Riggs, 133 U. S. 258, 271, 10 Sup. Ct. 295, 298 (1890); Asakura v. Seattle, 265 U. S. 332, 342, 44 Sup. Ct. 515, 516 (1923); Jordan v. Tashiro, 278 U. S. 123, 127, 49 Sup. Ct. 47, 48 (1928).

[38] Piggott observes that the "test [of the law of the asylum] is unscientific, and could not have been adopted independent of convenience". *Op. cit. supra* note 6, at 24.

[39] Printed in FOREIGN RELATIONS (1878) 268. The commissioners included some of the outstanding judges and lawyers of the day.

[40] *Id.* at 272.

[41] The practice of enumerating "extraditable offenses", ranging from specific crimes, like murder, to broad classes of crimes, like offenses against the bankruptcy laws, seems to be a vestige of the early days of extradition, which has outlived any function it may once have had. Even admitting that there are certain types of offenses with which extradition should not be concerned, such as those of a purely political or religious nature, these could be excluded from the operation of the treaties by clauses to that effect. A blanket undertaking to extradite for any crime, with these exceptions, would achieve in a much simpler manner the result intended by the cumbersome enumerations.

The offense of knowingly receiving fraudulently obtained property might well be denounced as criminal throughout the world.[42] The fact that for some reason it is not a crime in Illinois does not make such conduct less anti-social outside that state. As for the second point, it is obvious that authorities in one country are put to no unusual or highly difficult task if they are required to determine foreign law.[43] This is a not uncommon judicial function, and if adequate evidence of such law is offered (as may be required) no serious difficulty is presented. In fact some inquiry into foreign law is necessary in any case, since extradition may be rightfully refused if the laws of the demanding country do not make the acts charged criminal.[44]

The real problem, involving a serious difficulty, is not mentioned in the report. The requirement of mutual criminality operates as a check upon the power of a foreign nation to demand extradition for conduct which, though declared by it to be criminal, is not considered anti-social by the asylum country. If the requirement were eliminated one nation could insist upon the participation by another in the enforcement of laws which the latter might consider unjust. Suppose, for example, that a nation for purposes of oppression should enact a law which provides that upon the bankruptcy of a member of a specified minority group his relatives shall be required to contribute their property to the fund for creditors, and makes the evasion of this law a crime.[45] If a "criminal" under such a statute sought refuge in another country his extradition could not rightfully be refused under a treaty which included without qualification the class of offenses designated as "against the bankruptcy laws". The latter country would thus become an instrument aiding in the enforcement of such laws.

The danger described would be inconsiderable if extradition were limited to crimes existing at the time the treaty was made, since each nation would then have the opportunity to investigate the state of the criminal law in the other, and to draft the treaty accordingly. But extradition treaties are made with a consideration of the future and are generally held to permit extradition for conduct within the designated classes, *afterward* made criminal [46]—a feature undoubtedly desirable, since it would be highly impracticable to draft a new treaty at the creation of each new offense for which it was thought extradition should be granted. If the restriction of mutual criminality is removed, each nation has the privilege of demanding extradition for any conduct which *it* makes criminal before *or after* the treaty date, the only restriction being (as treaties are now drafted) that the conduct must fall within one of the loosely designated classes of offenses.

It would be idle to contend that there is no danger in such an extension of power to foreign nations. But it is easy to exaggerate the harm which may result. A government may create unjust and barbarous laws and within its own borders punish their violators, enduring with little loss the resultant verbal criticism of the world. But the same government would think many times before it asked another nation to aid it in the enforcement of such laws. The value of

[42] It is criminal by statute in many of the United States. See list in principal case at 197n.

[43] See PIGGOTT, *op. cit. supra* note 6, at 24.

[44] *In re* Tully, 20 Fed. 812 (C. C. S. D. N. Y. 1884).

[45] The imagination of Chief Justice Cockburn is even more vivid: "Suppose the local law of New York were to say picking pockets shall be deemed robbery or murder, must we take it so?" See *In re* Windsor, *supra* note 29, at 527.

[46] There does not appear to be any express provision to this effect in the treaties, but the courts by construction have reached that result. Muller's Case, *supra* note 6; United States v. Hecht, 16 F. (2d) 955 (C. C. A. 2d, 1927); *Re* Phipps, *supra* note 29; see Cohn v. Jones, *supra* note 6, at 645, 646. But see *In re* Gross, 43 Fed. 517, 519, 520 (E. D. N. C. 1890); *cf. In re* Eno, 10 Q. L. R. 194 (Can. 1884).

bringing an escaped criminal to punishment would hardly be worth the risk of directly offending another nation by abusing the privilege it has accorded. This consideration seems especially applicable to a great and influential nation like the United States, whose good will is highly valued, in dollars and cents, if not in more intangible terms. Moreover, an extradition treaty, like any other, can be terminated. Most existing treaties provide for termination by either party at will or on short notice.[47] The power to suspend or revoke operates both as a deterrent against abuse of the privilege and as a means of removing entirely the power of abuse from an offending nation.

Past experience affords no ground for a fear of wholesale breach of trust if the restriction of mutual criminality is removed. In the history of extradition official objections to the manner in which the privilege has been exercised have rarely if ever been made,[48] although almost as much opportunity for abuse is present with the requirement of criminality in the asylum as without it. There are no provisions in any treaty guaranteeing a fair trial of the accused, or insuring reasonable punishment. But these elementary principles of justice have always been observed, as of course they are expected to be, though their observance is not expressly required. There is no more reason to expect that a nation will enact outrageous laws and demand extradition for their breach than that any other gross miscarriage of justice will be perpetrated.[49]

Small as the real danger may be in eliminating the requirement of mutual criminality, it is pertinent to inquire whether any advantages which may thereby be gained are worth the risk of injurious consequences, whatever the extent of the latter. Granting extradition irrespective of the laws of the asylum results, however, in a number of important advantages. It more fully effectuates the elemental purpose of extradition: the effective suppression of anti-social conduct both at home and abroad.[50] When a nation enters into a treaty of extradition it both gains the privilege of requiring extradition and becomes obligated to grant it. By acquiring the privilege to demand surrender of fugitive criminals a nation is benefited because the administration of its own criminal system is thereby facilitated. The importance of this function of extradition can hardly be exaggerated. With modern conditions of swift and easy transportation the effective administration of criminal justice would be all but impossible if persons accused of crime could find an inviolable refuge in foreign lands.[51]

It seems clearly unwise to limit this valuable function of extradition to offenses which have been defined as crimes by both countries involved. A glance

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[47] Both art. x of the treaty of 1842 and the convention of 1889 are terminable at the will of either party. Treaty of 1842, art. xi, MALLOY, *loc. cit. supra* note 7; convention of 1889, art. ix, MALLOY, *supra* note 8. The latest extradition treaty with Great Britain (not yet promulgated by latter) provides for termination on six months' notice. 47 STAT. 2122 (1931), art. 18. The recent treaty with Greece provides for one year's notice. 47 STAT. 2194 (1931), art. xiii.

[48] The writer has been unable to find a single case of abuse.

[49] The whole practice of extradition is founded upon the confidence of contracting nations in the justness of each other's criminal law and the reasonableness of its judicial administration. See Report of the Royal Commissioners, *supra* note 39, at 270; 1 HYDE, *op. cit. supra* note 6, at 567. Lack of such confidence appears to be the reason for the refusal of the American government to enter into an extradition treaty with China. See 1 MOORE, *op. cit. supra* note 6, at 81n.

[50] The preamble of the treaty of 1842 states that the arrangements for extradition are "for the better administration of justice and the prevention of crime within the territories and jurisdiction of the two parties". 1 MALLOY, *op. cit. supra* note 7, at 651. See Report of Royal Commissioners, *supra* note 39, at 269.

[51] 1 MOORE, *op. cit. supra* note 6, at 5. Fugitive criminals might be tried and punished by the country of asylum; but this is obviously undesirable, and it is one of the objects of extradition to avoid the necessity for such a practice. See 1 *id.* at 154.

at any of the modern treaties reveals that the list of extraditable "offenses" includes classes of crimes which are of relatively recent origin in the law and which are in the course of development, such as offenses against the bankruptcy and customs laws and those involving breach of trust.[52] It is obvious that some crimes of this nature are not universal among the nations of the world; the laws of one country may denounce particular conduct within these classes as criminal, while those of another may not. It is *possible* that the reason for the discrepancy is a difference in the views of the two countries as to what is anti-social conduct. But other explanations seem much more plausible: conduct of that particular kind may be so infrequent in one country that the necessity for legislating against it has not been brought to the attention of the government; or the legislature may have been slow to enact the necessary statutes. It seems undesirable that one engaging in such conduct in the country which has made it criminal should escape punishment merely because he has fled to a country which, for one of the reasons stated, has not recognized the crime. On the contrary, it is highly desirable from the viewpoint of each nation that the fugitive be extradited, since the administration of criminal justice of the one is facilitated, and the other not only is rid of a criminal [53] but enjoys the reciprocal privilege of demanding extradition when the situation is reversed.

It should be kept in mind that the existence of such a situation is not a remote possibility; it is probable today [54] and increasingly likely to arise in the future as the criminal law expands. Moreover, it is precisely the persons who commit the more "modern" offenses who are most apt to escape the local police. It is the swindler, the embezzler, the criminal with "brains", rather than the thief or murderer, who will seek refuge in a foreign country. To permit to any considerable extent such persons to escape trial and punishment might well have serious consequences upon the administration of criminal justice and general respect for law. It certainly would tend to defeat the basic purpose for which extradition was instituted.[55]

Another consideration applicable to the case of countries like the United States, where the criminal law is likely to differ in the various political subdivisions, is that the requirement of criminality in the asylum may lead to lack of uniformity and reciprocity in administering extradition under each treaty.[56] In the United States, in the absence of federal legislation covering the offense involved, the "asylum" is considered to be the state in which the fugitive is

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[52] See for example the recent treaties with Cuba, 44 STAT. 2392 (1926); Great Britain, *supra* note 47; Honduras, 45 STAT. 2489 (1927).

[53] "Criminal" in the general sense of a person of anti-social tendencies.

[54] The Factor case is itself a recent example. In the Insull case it seems that one of the grounds for refusal of extradition by the Greek court was that the conduct in question did not constitute "embezzlement" under Greek law (the treaty expressly providing that extradition for "embezzlement" should be granted only if the offense was punishable by both countries). See Note (1933) 31 MICH. L. REV. 557 n. 54.

[55] Few of the authorities recognize this inconsistency between the requirement of mutual criminality and the purpose of extradition. Piggott observes that the requirement is "diametrically opposed to the fundamental principle of extradition". *Op. cit. supra* note 6, at 109. See *In re* Metzger, *supra* note 4, at 238.

Curiously enough, however, in condemning the practice prevalent among many nations of exempting their own citizens from extradition, the authorities point with great eloquence to the inconsistency between that practice and the basic objective of extradition. See Report of Royal Commissioners, *supra* note 39, at 270, 271; 1 MOORE, *op. cit. supra* note 6, at 154; statement of Secretary of State Blaine cited in 1 HYDE, *op. cit. supra* note 6, at 578n; quotation from Pena, in Pente, *Principles of International Extradition in Latin America* (1930) 28 MICH. L. REV. 665, 711.

[56] See Note (1933) 42 YALE L. J. 978, 979.

found.[57] If extradition is to depend in each case upon the laws of the particular state,[58] the government will have to refuse extradition in some cases and grant it in others involving the same offense and the same treaty. Since one of the essential purposes for which extradition treaties are negotiated is to make the obligation to surrender for a given offense as certain as possible, this result, because it tends to defeat that purpose, is clearly undesirable. Moreover the government will enjoy the privilege of demanding extradition for an offense committed in a state which makes it criminal,[59] even though it might not be obligated to surrender a person who committed the same offense in the other country. This failure of reciprocity violates a principle underlying all international dealings.

Conclusion

By eliminating the restriction of mutual criminality a nation both loses and gains. By agreeing to extradite for conduct criminal in the foreign country but not at home, it undertakes to aid in the enforcement of rules of conduct without regard to its own public policy. Such a grant of power, like almost every extension of trust, necessarily involves a danger of abuse and consequently a risk of harm. On the other hand such a step results in a number of valuable gains: (1) each nation acquires the privilege to demand extradition for offenses which are criminal by its laws, though not by the laws of the asylum, a privilege which is becoming increasingly valuable because of the rapid development of new types of crimes; (2) by extending extradition to cases of offenses criminal only in the demanding country the administration of criminal law in foreign countries is facilitated, thus promoting justice in general, and serving to maintain good will among the nations; (3) in the case of nations having a diversity of criminal law within their boundaries, uniformity of administration and reciprocity of obligation are achieved.

An intelligent choice of policy on this question should be based upon a balancing of these advantages and disadvantages. In the opinion of the writer the gains well outweigh the losses. The latter, it should be remembered, are chiefly in the form of *risks* of harm—possible, not necessary and immediate loss. Moreover, as has been pointed out, the danger involved is not so great as might perhaps be imagined. Most of the advantages to be gained, on the contrary, are actual, substantial, and almost certain to be realized. The opportunity of reaching those committing the "new" types of crimes, who would otherwise escape with impunity, appears vital to the continued growth of the criminal law, and alone seems well worth the risk to which a nation might be exposed by increasing the extradition privileges of foreign governments.

The conclusion therefore seems inevitable that as a matter of policy criminality in the asylum ought not to be required. If the decision of the principal case is followed this policy will be put into practice by the United States, except in those cases which fall under the few treaties expressly requiring mutual criminality. This decision, therefore, whatever may be said of its soundness from the

[57] *Cf.* Wright v. Henkel; Muller's Case, both *supra* note 6; *In re* Dubroca, 33 F. (2d) 181 (E. D. Pa. 1929) (all cases holding that where criminality in the asylum is necessary criminality by the laws of the state of asylum is sufficient).

[58] It might be suggested that the "asylum" in such cases should be the entire country, and the "law" to be considered should be, not that of a particular jurisdiction, but that generally recognized in the various states. Such a procedure, however, would be contrary, at least by implication, to the great weight of judicial opinion (see cases *supra* note 57). Moreover, since opinions might readily differ in each case as to what the "general law" of a country is, great difficulties would be encountered in practice, and almost as much uncertainty would result in administering the treaties as if each state were regarded as the asylum.

[59] *Cf. Re* McCartney, 8 Man. L. R. 367 (Can. 1891); *In re* Murphy, 22 A. R. 386 (Can. 1895).

point of view of treaty construction, is a progressive step in the development of international extradition.[60] It is to be hoped that the government will not nullify its effect by insisting upon express provisions in future treaties requiring criminalty in the asylum, but that it will instead clarify its position by requiring stipulations to the contrary.

B. E.

"MUTUALITY" AS A REQUIREMENT FOR SET-OFF IN PENNSYLVANIA—*Thacher's Estate*,[1] recently decided by the Supreme Court of Pennsylvania, focuses attention once more upon a problem which has been the subject of continual litigation since the founding of the Commonwealth. "A cardinal rule in the interpretation of statutes of set-off requires that there be mutuality of demand both as regards the quality of the right, and the identity of the parties." [2] This is the classic statement of the applicable formula. When this "mutuality" exists is a problem which the formula does not solve. A brief review of the origin of set-off in this state and the purposes for which the right was created will throw light on the subsequent catalogue and evaluation of the solutions achieved by the courts of Pennsylvania.

Set-off, in Pennsylvania as elsewhere, is dual in origin. On the one hand there is the *Defalcation Act* of 1705, which authorizes set-off in legal actions ". . . if two or more dealing together be indebted to each other . . ." [3] On the other is the power of Equity, recognized and exercised long before any statutes on the matter, to order the payment of the balance only, where mutual debts were found to exist.[4] The recognition of the persistence of the equity power after the passage of the statute is a matter of peculiar importance; and it was expressed very early in what is one of the most frequently cited passages in this branch of Pennsylvania law:

> "Set off, itself, was originally nothing more than an equitable defence, which the legislature has thought fit, in plain and simple cases, to subject to the jurisdiction of the courts of common law, reserving to chancery, its original jurisdiction of cross demands, which do not fall within the statute. That such a statute should have been thought necessary here, where the jurisdiction of the courts is compounded of law and equity, is attributable to the unsettled state of the practice at the time. As their equitable jurisdiction is now settled, and universally understood, the courts would be competent to do complete justice, without the statute, as is shown by their having frequently gone beyond it." [5]

But even while declaring that Equity exercises a different and broader power to order set-off than that authorized at law by the statute, the courts have not hesitated to allow the equitable defense in legal actions.[6] It follows that the

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[60] The progressiveness of the United States in the field of extradition seems to be traditional. See the gracious compliment of Clarke, the English authority, *op. cit. supra* note 15, at 27.

[1] 311 Pa. 278, 166 Atl. 873 (1933).

[2] Stuart v. Commonwealth, 8 Watts 74, 75 (Pa. 1839).

[3] 2 STAT. AT LARGE PA. 241 (1705).

[4] See Lloyd, *The Development of Set-Off* (1916) 64 U. OF PA. L. REV. 541, 547.

[5] Gibson, J., in Frantz v. Brown, 1 P. & W. 257, 261 (Pa. 1830); see Hibert v. Lang, 165 Pa. 439, 441, 30 Atl. 1004, 1005 (1895).

[6] Murray v. Williamson, 3 Binn. 135 (Pa. 1830); Krause v. Beitel, 3 Rawle 199 (Pa. 1831); Hibert v. Lang, *supra* note 5; Craighead v. Swartz, 219 Pa. 149, 67 Atl. 1003 (1907).

Defalcation Act, which purported to create the right of set-off at law, may with safety be ignored by the law courts, since the powers which it confers are included in the broader equitable powers which these same courts have assumed. No court, therefore, can justify its refusal to allow set-off merely by reference to the Act.

But to say that the limitations of the statute do not restrict the judicial power is not to say that there are no bounds to that power, or that each problem will be referred for solution to the chancellor's sense of natural justice. Whatever the word may mean, some requirement of "mutuality" still remains. Obviously, *D* will not be permitted to plead, in an action by *P*, that *P* owes money to *X*, a stranger.[7] On the other hand it is equally well settled, despite an occasional *dictum* to the contrary, that the debts proposed to be set off need not be such that the defendant might maintain a cross action in his own name against the plaintiff.[8]

The considerations which determine where, between these two positions, the line should be drawn are or should be those which led both courts and the legislature to create the right of set-off.

> "Two distinct motives may be detected; one based on the idea that an injustice is done the defendant in refusing him this privilege,[9] the other that unnecessary lawsuits are a nuisance.[10] The predominance of the latter notion leads to enactments favoring affirmative relief for the defendant;[11] the predominance of the former to purely defensive actions." [12]

To decide whether an "injustice is done the defendant" in refusing set-off requires consideration of the possibility of greater injustice to third parties if the privilege is granted—an injustice, for example, to the general creditors of an insolvent plaintiff against whom the set-off is asserted. It is here that a curious confusion has entered into the discussion of "mutuality". Logically, of course, whether *A* and *B* are mutually indebted is a question independent of the solvency of either. Yet where the issue is "mutuality", the cases have reckoned insolvency as a factor, though they are by no means in agreement on its effect.[13] Nowhere

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[7] *Cf.* Longafelt v. Bartsher, 3 P. & W. 492 (Pa. 1832); Russ v. Sadler, 197 Pa. 51, 46 Atl. 903 (1900). The former case presents in a very interesting manner the fundamental generalization that the debts to be set off must be owed by the plaintiff and to the defendant.

[8] Murray v. Williamson, *supra* note 6, is a strong and explicit statement of this principle, for recent reiterations of which see Gordon v. Union Trust Co., 308 Pa. 493, 496, 162 Atl. 293, 294 (1932); United States Bank & Trust Co. Case, 311 Pa. 320, 324, 166 Atl. 871, 872 (1933); Lewis, *Set Off in Insolvency* (1933) 17 PA. B. A. Q. 136. But see Watson v. Hensel, 7 Watts 344, 346 (Pa. 1838).

[9] The argument being that the only amount really owing is the balance. See 3 STORY, EQUITY JURISPRUDENCE (14th ed. 1918) § 1868; Murray v. Williamson, *supra* note 6, at 137. The Defalcation Act adopted this theory, for it speaks of the set-off as so much "paid", authorizes the defalcation to be introduced under the plea of "payment", and provides that where the defalcation exceeds the sum demanded, the plaintiff being "over paid", judgment may be entered against him for the difference.

[10] See Potter v. Burd, 4 Watts 15, 18 (Pa. 1835); Tustin v. Cameron, 5 Whart. 379, 380 (Pa. 1839) where the court stated: "It is the practicability of avoiding circuity and needless costs with safety and convenience to all parties, which determines the question of set-off. . . ."

[11] Pennsylvania was the first common law jurisdiction to permit a recovery by the defendant against the plaintiff when his counterclaim exceeded the plaintiff's demand. See Lloyd, *supra* note 4, at 557.

[12] *Ibid.*

[13] Favoring set-off because of insolvency: Lewis v. Culbertson, 11 S. & R. 48 (Pa. 1824); Stewart v. Coulter, 12 S. & R. 252, at 446 (Pa. 1824). Insolvency as a factor against set-off: see Singerley v. Swain's Adm'rs, 33 Pa. 102, 105 (1859); Stephens v. Cotterell, 99 Pa. 188, 192 (1881). The general rule elsewhere is in favor of set-off. See LAWRENCE, EQUITY JURISPRUDENCE (1929) § 1077; WATERMAN, SET-OFF (1869) §§ 395, 396. *Cf.* Note (1928) 76 U. OF PA. L. REV. 314, 317, and Note (1932) 80 U. OF PA. L. REV. 420, 428.

in the Pennsylvania cases is it regarded as a circumstance of more than secondary import; and, as a matter of fact, it seems usually to have been employed to confirm whatever conclusion the court had previously reached.

In so treating insolvency, the courts have subordinated a primary element in the problem of equitable set-off. Whether or not a defendant, allowed to set off against an insolvent plaintiff, receives a technical "preference", it cannot be doubted that practically he is much better off than other creditors. Applying the maxim that "Equality is Equity", it would seem to follow that insolvency should invariably defeat set-off. But that *A* must pay *B* one hundred cents on the dollar, leaving *B*, as a general creditor of *A*, only a dividend in insolvency, was the very situation the unfairness of which led to the creation of the right of set-off. Against this long and well recognized specific equity the maxim, as usual, is unavailing. When, however, the court goes beyond this very situation, where the indebtedness is actually mutual, and, for example, permits co-defendants to set off an obligation due one of them, such set-off is allowed not because of any unfairness in making *A* pay *B* in full, while *C* recovers from *B* only a dividend, but to avoid needless multiplicity of actions. Since the burden of bringing an extra action is not to be compared to the money loss suffered by the general creditors of an insolvent when a preference is allowed, the conclusion is inevitable that in all cases except where, regarding the real parties at interest, strict mutuality exists, insolvency should bar set-off. Nevertheless, an examination of the decisions discloses that the Supreme Court of Pennsylvania, in common with the appellate courts of many other jurisdictions, has failed to make this or in fact any significant analysis of the general problem involved.

One of the first situations in which the court was called upon to deal with the question of "mutuality" was the action to recover a legacy to a *feme covert*, the executors pleading as set-off a debt owed by the husband. The decisions reflect the law of domestic relations rather than set-off; but the results are nevertheless of interest here because they forecast the difficulty which the court was later to experience in distinguishing between the nominal and real parties at interest in order to determine whether there were mutual debts between the latter. At a time when the husband was not merely a necessary party, procedurally, in the wife's action, but in fact the "substantial owner of the wife's share", it is not surprising that the court allowed the husband's debt to be set off.[14] Where the husband died,[15] or was divorced,[16] before the wife brought action to recover her share, the set-off was properly refused, since although the husband had the uncontrolled power of disposing of his wife's choses-in-action during the continuance of the marital relation, at its termination they survived to her absolutely. Consistently, it was held that where he never had this power of disposal, as where the legacy was "for her own use", set-off of the husband's debt should be refused.[17] With the gradual recognition of married women's property rights the problem has become academic. Husband and wife are now treated as strangers for set-off purposes.[18]

Another set of cases which early came up for decision can be represented by two type cases: (1) *A* and *B* sue *C*, who sets off a claim on *A*; (2) *X* sues *Y* and *Z*, who set off a claim due *Y*. No proposition is better settled than that which permits set-off in the latter situation,[19] though this is not the law in other

[14] Yohe v. Barnett, 1 Binn. 358 (Pa. 1808); Wisharti v. Downey, 15 S. & R. 77 (Pa. 1826); Lowman's Appeal, 3 W. & S. 349 (Pa. 1842).

[15] Flory v. Becker, 2 Pa. 470 (1846).

[16] Fink v. Hake, 6 Watts 131 (Pa. 1837).

[17] Jamison v. Brady, 6 S. & R. 466 (Pa. 1821).

[18] Bentz v. Bentz, 95 Pa. 216 (1880); Litle's Est., 244 Pa. 368, 90 Atl. 733 (1914).

[19] Robinson v. Beall, 3 Yeates 267 (Pa. 1801); Childerston v. Hammon, 9 S. & R. 68 (Pa. 1822); Miller v. Kreiter, 76 Pa. 78 (1874).

jurisdictions.[20] Set-off is refused in the former case; and the distinction is quite proper, since it is one thing to allow *Z*, if he will, to pay the debt of his co-defendant, but quite another to permit *C* to assert, as payment of the claim of *A* and *B*, his claim on *A*.[21] *B's* objection to such an attempt, which in effect would *compel* him to accept the debt of *A* for that of *C*, is not unwarranted. Similarly, the defendant may not set off against an individual plaintiff a claim due jointly by plaintiff and others, since plaintiff has the right to have his co-obligors joined in an action on their common obligation.[22] A very interesting case *à propos* the problem of setting off joint and separate claims is *Watson v. Hensel*.[23] A guardian sued to the use of three children on a mortgage which was part of the estate of their father, who died intestate. The defendant wished to set off valid several claims for the support of each child. The court refused, on the ground that "It is a joint demand by several plaintiffs, and certainly a separate claim by the defendant against each cannot be set off for the want of that mutuality which is absolutely essential. A set-off is in the nature of a cross-suit, and it cannot be pretended that a joint suit would lie against the infants by the present defendants." [24] Three years later, counsel for plaintiff cited *Watson v. Hensel* against set-off in the following situation: *A* obtained judgment against *B*, and assigned part to *C*, the rest to *D*. In an action by *A* to the use of *C* and *D*, *B* wished to set off several claims on the use plaintiffs. Here, too, a joint suit could not have been brought by the defendant. But the court, without discussing *Watson v. Hensel*, very properly allowed the set-off.[25] Here, if ever, the policy of avoiding unnecessary lawsuits, embodied in the right of set-off, applies.

Perhaps the farthest case in this field is *Hibert v. Lang*,[26] where defendant was permitted to set off a claim due a several co-obligor, not sued, with the consent of the latter. The decision comes perilously close to a holding that the defendant may set off *any* claim on the plaintiff, provided he gets the consent of the owner of that claim and no third party's interest is injured.[27] The reasoning, however, confines the holding to its own facts, the court arguing that since the several co-obligor might have asserted his set-off had the obligee chosen to sue *him*, and since in a suit by the defendant for contribution the co-obligor would have no set-off, the plaintiff may not, by electing to sue one, deprive the other of the opportunity to set off. It is interesting to speculate on the result the court would have reached had the plaintiff been insolvent, in view of the reasoning it gives in support of its holding.

On principle, the set-off of partnership claims is analogous to the cases just discussed; but the question has come up on different party alignments: the usual case in the preceding group was an attempt by several defendants to set off an obligation due one of them, while the commonest partnership case is that in which one defendant desires to set off a claim due himself and others as partners. He

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[20] *Cf.* 57 C. J. 455; WATERMAN, *op. cit. supra* note 13, § 383.

[21] Bentz v. Bentz, *supra* note 18. The argument given is from Wrenshall v. Cook, 7 Watts 464, 465 (Pa. 1838).

[22] Mintz v. Tri-County Natural Gas Co., 259 Pa. 477, 103 Atl. 285 (1918).

[23] *Supra* note 8.

[24] *Id.* at 346. It is obvious that the interests of the children in the mortgage were several, though asserted together in the name of the guardian who had legal title.

[25] Hugg v. Brown, 6 Whart. 468 (Pa. 1841); *cf.* Smith v. Myler, 22 Pa. 36 (1853) (permitting one of the holders of a joint note to use it as set-off to the extent of his interest therein).

[26] *Supra* note 5. But *cf.* Henderson v. Lewis, 9 S. & R. 379 (Pa. 1823), which is more nearly in conflict than the court in Hibert v. Lang is willing to admit.

[27] Should the law ever reach this position—and no good reason against it suggests itself to the writer—we should have a legal doctrine analogous to the equitable "clean hands" principle: One who wishes to collect his debts in legal actions must pay his own just obligations.

has been permitted to do so where the consent of the partners is shown,[28] although an individual defendant can set off neither a claim on the partnership against a partner's demand,[29] nor a claim on a partner against a partnership demand.[30] The case of the surviving partner is of especial interest because the two decisions on the point present a neat logical contradiction. Where the surviving partner was suing on a partnership claim, his personal debt was not available to the defendant as set-off;[31] but where he was being sued on a partnership obligation, he was permitted to set off his private demand on the plaintiff.[32] Justice Gibson's observation in the former case that "though a surviving partner may chose [*sic*] to treat a partnership debt as due him in his own right, it does not follow that a defendant . . . has a correspondent right"[33] presents the interesting but unacceptable proposition that the "mutuality" of two claims may depend on the will of one of the parties.

A situation in which repeated failures seem not to have discouraged further efforts to obtain set-off is represented in *Union Bank v. Canonsburg Iron Co.*[34] Defendant paid his note to plaintiff with a check on a bank, which failed before paying. In a suit on the note, defendant wished to set off a debt of the plaintiff to the bank. The argument "I won't pay you because you won't pay my debtor" has a non-rational appeal which can be overcome only by a realization of the confusion which would result from accepting it. In the ordinary action on a note, the court and jury must determine the validity of one claim. Where defendant pleads set-off, two claims must be tried and their "mutuality" determined. But if it may be pleaded as set-off that plaintiff hasn't paid defendant's debtor, three distinct claims must be tried, even excluding the possibility that plaintiff may have the same sort of set-off against his creditor that defendant asserts against the plaintiff. The policy of avoiding circuity of actions certainly does not extend so far.[35] The rule which permits a surety to set off a debt due his insolvent principal[36] must be regarded as an exception to this on grounds which can be allocated to surety law.[37] Where, however, principal and surety are sued jointly, the case is treated like the ordinary one of joint defendants setting off a debt due one of them.[38]

The few cases in which the court has considered the right of a garnishee to set off against the garnishor a demand on their mutual debtor have been confused by the presence of other factors; but generally, the privilege has been denied.[39] One would have expected the opposite result since the garnishee is ordinarily liable to the garnishor only as the former would have been liable to the person whose funds are attached.

A case much more frequent and important in present-day litigation than any heretofore discussed involves the "mutuality" of claims by and against trustees. Where the trustee is plaintiff, and the obligation in suit is part of the trust estate,

[28] Tustin v. Cameron, *supra* note 10; Montz v. Morris, 89 Pa. 392 (1879); Edelman v. Scholl, 65 Pa. Super. 357 (1916).

[29] M'Dowell v. Tyson, 14 S. & R. 300 (Pa. 1826).

[30] Archer v. Dunn, 2 W. & S. 327 (Pa. 1841).

[31] Waln v. Hewes, 5 S. & R. 468 (Pa. 1820).

[32] Lewis v. Culbertson, *supra* note 13.

[33] Waln v. Hewes, *supra* note 31, at 471.

[34] 6 Atl. 577 (Pa. 1886).

[35] Accord: Carman v. Garrison, 13 Pa. 158 (1850); Longafelt v. Bartsher; Russ v. Sadler, both *supra* note 7.

[36] Craighead v. Swartz, *supra* note 6; *cf.* Hibert v. Lang, *supra* note 5.

[37] See ARANT, SURETYSHIP AND GUARANTY (1931) 210, 213; WATERMAN, *op cit. supra* note 13, §§ 237, 238.

[38] Balsley v. Hoffman, 13 Pa. 603 (1850).

[39] Crammond v. Bank of United States, 1 Binn. 64 (Pa. 1803); Reed v. Penrose's Ex'rs, 36 Pa. 214 (1860); Lorenz's Adm'rs v. King, 38 Pa. 93 (1860).

the defendant may set off claims on the *cestui que trust*,[40] but not claims on the plaintiff personally.[41] Where the trustee is defendant, he cannot set off a claim in his own right against his liability as trustee,[42] nor a claim as trustee against his personal liability.[43] In the first situation there would seem to be no reason, where the plaintiff is solvent, why the trustee should not be permitted to pay a liability of the estate with his personal asset. The beneficiary could not suffer from the substitution of the trustee as creditor of the estate instead of the plaintiff, who is already in court asking for his money. In the second situation, the reasons usually given for denying set-off, aside from a perfunctory statement that mutuality is lacking, are (1) "The manifest effect of allowing a set-off would be to enable a debtor to pay a debt of his own with money belonging to other people";[44] (2) an implied contract to waive the right of set-off.[45] The latter may be dismissed with the comment that if the facts justify such an implication the reason is valid, but that its indiscriminate use suggests that "implied contract" is a mere rationalization of the result. The former is an unhappy expression of a perfectly valid reason for refusing set-off. The expression is unfortunate because it is unrealistic in its connotation of embezzlement in a situation where, as a matter of fact, the trustee is usually engaged in a laudable attempt to effect a quick and complete salvage of the *cestui's* asset by asserting it as set-off. The valid reason, imperfectly expressed, is that if the set-off is permitted the trustee would become debtor to the estate, a situation, the practical undesirability of which is cearly recognized in the law of trusts.[46] Of course, where the plaintiff is insolvent, set-off should be refused on this ground alone, since no strict mutuality exists.

Agents have been treated like trustees for set-off purposes, and for the same reasons, to wit: an implied undertaking to waive set-off;[47] and a desire not to permit the defendant to "blend" his personal and fiduciary business.[48] It may be observed, however, that where a principal, owing his agent money, puts the latter in funds to be applied to a particular purpose, the implication of a waiver of set-off is not far-fetched.[49]

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[40] Childerston v. Hammon, *supra* note 19.

[41] United States Bank & Trust Co. Case, *supra* note 8.

[42] Kelter v. American Bankers Fin. Co., 306 Pa. 483, 160 Atl. 127 (1932). But *cf.* Commonwealth v. Tradesmen's Trust Co. (No. 1), 250 Pa. 372, 95 Atl. 574 (1915) (where the only distinguishing feature was the fact that if there was a trust, the funds had been mingled by the defendant with its general funds, certainly not a factor which should favor the defendant).

[43] Hunter v. Henning, 259 Pa. 347, 103 Atl. 61 (1918); Gordon v. Union Trust Co., *supra* note 8. For discussion of these cases see Lewis, *supra* note 8, at 137; Note (1928) 76 U. OF PA. L. REV. 314, 317.

[44] Hunter v. Henning, *supra* note 43, at 354, 103 Atl. at 63.

[45] Valley Butter Co. v. Minnesota Cooperative Creameries, 300 Pa. 102, 150 Atl. 157 (1930); *cf.* Marshall v. Brainerd, 253 Pa. 35, 40, 97 Atl. 1057, 1058 (1916).

[46] TRUSTS RESTATEMENT (Am. L. Inst. 1930) Tentative Draft No. 1, § 75.

[47] Russell v. First Presb. Church, 65 Pa. 9 (1870); Tagg v. Bowman, 99 Pa. 376 (1882); Shearman v. Morrison, 149 Pa. 386, 24 Atl. 313 (1892); Hostetter v. Giffen, 268 Pa. 530, 112 Atl. 150 (1920).

[48] See Wilson v. Lewistown, 1 W. & S. 428, 432 (Pa. 1841) (school tax collector sued by borough for amount of taxes collected not allowed to set-off for work done by him on the school houses).

[49] Bache v. Philips, 155 Pa. 103, 25 Atl. 891 (1893), is worthy of note as a case where the court not only did not recognize the existence of an agency, but also denied set-off in a situation where, looking at the real parties at interest, there was actual mutuality. Holmes v. German Security Bank, 87 Pa. 525 (1878), which was relied upon, presents the curious doctrine that the issue of a draft and bill of lading against goods forwarded to an agent for sale is an "appropriation" of the proceeds of the sale, after notice of which the agent cannot apply such proceeds to his own claim on the shipper, by way of set-off.

It is in the cases of decedents' estates—the right of set-off by and against executors and administrators—that the court has gone farthest astray by employing a set of tenuous technical distinctions in the determination of that elusive element "mutuality". The obvious proposition was early adjudicated that debts owed by the deceased and claims due him in his lifetime were mutual, though death substituted an executor in the procedural position of defending and asserting these obligations.[50] An unobjectionable amplification of this rule permitted the set-off where the claim against the estate was for a distributive share,[51] where the debt owed by the deceased did not mature until after his death,[52] or where the debt due the deceased was transmuted after his death into a bond naming the executors as payees.[53]

From this point on there is little but confusion. As against two cases holding that an executor cannot set off against a distributee's claim of a share in the estate the distributee's debt to the executor personally,[54] there is the extraordinary case of *Krause v. Beitel,* where the set-off was permitted despite the presence of three other adverse factors.[55] In contrast with the incomprehensible rule that when an executor sells goods of the estate, or by any other act acquires a cause of action on behalf of the estate which the deceased never had, the defendant may not set off a debt owed by the deceased,[56] stands a decision like *Solliday v. Bissey,* where in an action against the executors of the estate of *A,* they were permitted to set off rent due from the plaintiff to the defendants as executors of the estate of *B* on a lease made after *B's* death.[57] The cases cited above [58] fall into error by using too literally a statement invented for a very different purpose. From a desire to remove all legal obstacles in the way of actions by executors on claims due the estate, "it has been said, they are the personal property of the executors; that naming them executors is only surplusage, &c." [59] Consequently, it is argued, these obligations are not held "in the same right", as obligations due to and from the decedent. It is impossible to justify decisions resting on nothing more substantial than this bit of loose language.

Where the executor claims in his right as such, no good reason can be adduced for refusing to set off a claim on the decedent or his estate. The case is not merely one which should appeal to Equity; it seems, rather, one of the few situations to reach litigation where actual mutuality in the statutory sense exists.

The survey which has just been concluded reveals three important conditions to be remedied in Pennsylvania set-off law. Perhaps the most important is the

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[50] Boyd v. Thompson, 2 Yeates 217 (Pa. 1797); Murray v. Williamson, *supra* note 6.

[51] Manifold's Est., 5 W. & S. 340 (Pa. 1843).

[52] Hicks v. National Bank, 168 Pa. 638, 32 Atl. 63 (1895). The English rule is otherwise. See 2 WILLIAMS, EXECUTORS (12th ed. 1930) 1230.

[53] Crist v. Brindle, 2 Rawle 121 (Pa. 1828).

[54] Bradshaw's Appeal, 3 Grant's Cases 109 (Pa. 1861); *cf.* Lorenz's Adm'rs v. King, *supra* note 39; Waln v. Hewes, *supra* note 31 (in this case the claim was by a judgment creditor against defendant as executor of the estate).

[55] Krause v. Beitel, *supra* note 6. The other factors were: (1) The set-off was a debt due one of joint defendants; (2) It was the debt of the husband while the plaintiff's action was for a legacy to the wife; (3) The husband was insolvent.

[56] Wolfersberger v. Bucher, 10 S. & R. 10 (Pa. 1823); Singerly v. Swain's Adm'rs; Stephens v. Cotterell, both *supra* note 13; see Thacher's Est., *supra* note 1, at 281, 166 Atl. at 874; *cf.* Stuart v. Commonwealth, *supra* note 2. The converse, that executors cannot set off in an action against them on a debt owed by the deceased, claims on the plaintiff acquired after the death of the deceased, is held in Darroch v. Adm'rs of Hay, 2 Yeates 208 (Pa. 1797); Potter v. Burd, *supra* note 10.

[57] 12 Pa. 347 (1849); *cf.* Steinmeyer v. Ewalt Bridge Co., 189 Pa. 145, 42 Atl. 132 (1899) (executors sue for stock dividend declared after decedent's death; defendants allowed to set off obligation of deceased); Thacher's Est., *supra* note 1.

[58] *Supra* note 56.

[59] Crist v. Brindle, *supra* note 53, points out the error.

failure of the court, in administering an equitable remedy, to take a consistent position on the effect of insolvency. Second is the refusal to recognize actual mutuality, notably in the case of the executor. Third is a persistent attachment to the magic word "mutuality", the tag to be affixed when the court permits set-off, the stern law to which the defendant is referred when set-off is denied. The word obscures the real issue in most of the cases—how far it is desirable to carry out the policy of avoiding unnecessary actions.

Thacher's Estate[60] offered an admirable opportunity to review and reorganize. The receivers of an insolvent bank sued defendant as executor on a note of the deceased. The deceased, at his death, had on deposit with the bank $6711.89. The defendant withdrew this, redeposited it in his own name as executor, and subsequently, until the bank's insolvency, made deposits and withdrawals. The defendant sought to set off the balance remaining in the account at the time of the bank's insolvency against his liability on the note. The court permitted the set-off in an unanalytical opinion containing two regrettable sentences literally declaring the immateriality of reason or logic in Pennsylvania set-off law.[61] The result reached was correct, but inconsistent with earlier decisions [62] for the executor's claim on account of the deposit was not one which the deceased ever had.[63] The same holding with a recognition of the inconsistency would have made the case vastly more valuable as the starting point for a much needed revision of set-off law in this state.

L. B. S.

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[60] *Supra* note 1.

[61] *Supra* note 1, at 282, 166 Atl. at 874.

[62] See text *supra* page and cases cited in note 56.

[63] Crist v. Brindle, *supra* note 53, is a possible authority for Thacher's Est., regarding the bank's liability to the executor as a mere reincarnation of its quondam liability to the deceased. But the analogy fails when the executor's subsequent deposits and withdrawals are considered.